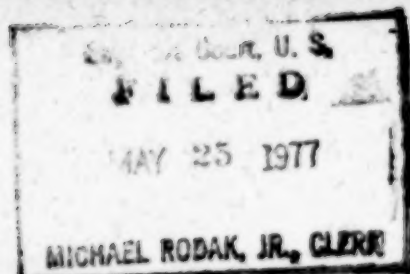


No. 76-1363



In the Supreme Court of the United States

OCTOBER TERM, 1976

WILLIAM DAVIS MARTIN, PETITIONER

v.

W. GRAHAM CLAYTOR, JR.,
SECRETARY OF THE NAVY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES OF APPEALS FOR
THE SECOND CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS
IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that he is entitled to promotion to the temporary rank of Captain, United States Naval Reserve, because his name was removed from the promotion list by the Secretary of the Navy rather than by the President personally.

Under the statutory scheme for promotions in the Naval Reserve, a candidate recommended by a selection board for promotion to either temporary or permanent ranks is placed on a promotion list. 10 U.S.C. 5902. If he is a candidate for the rank of Captain or higher, he is then nominated by the President for promotion and his name is submitted to the Senate for confirmation. 10 U.S.C. 5912. If confirmed, his promotion to the higher rank is completed when the President signs and issues his commission. *D'Arco v. United States*, 441 F. 2d 1173 (Ct. Cl.).

Petitioner, a Commander in the Naval Reserve, was placed on a promotion list, nominated by the President for promotion to the temporary rank of Captain, and confirmed by the Senate on April 24, 1974 (Pet. App. A-6 to A-8). However, on May 3, 1974, before his commission was signed or issued, he allegedly "streaked" through the ballroom of the Belmont Hotel in New York City, where a U.S. Naval Reserve dance was in progress (*id.* at A-8). The Chief of Naval Reserves ordered an investigation, which petitioner unsuccessfully sought to restrain. *Martin v. Warner*, 377 F. Supp. 1039 (E.D. N.Y.), affirmed, C.A. 2, No. 74-1881, January 21, 1975. On June 28, 1974, the Secretary of the Navy, pursuant to 10 U.S.C. 5902(d), authorized the Chief of Naval Personnel to "take no action with regard to temporary promotion of [petitioner] pending resolution of his alleged misconduct" (Pet. App. A-9).

As a result of the investigation, the Chief of Naval Reserves concluded that petitioner was not qualified to remain on active duty and, if eligible, should be given the opportunity to retire at the grade of Commander (Pet. App. A-10). On November 12, 1974, the Secretary of the Navy approved a memorandum from the Bureau of Naval Personnel recommending that the Secretary, "acting for the President" pursuant to 10 U.S.C. 5905(a), remove petitioner's name from the promotion list (Pet. App. A-10 to A-11).

Petitioner then brought this action in the United States District Court for the Eastern District of New York, seeking an order that he be promoted to Captain, USNR, retroactive to July 1, 1974 (Pet. App. A-6). The district court dismissed the complaint, holding that the President had no obligation to complete petitioner's appointment by preparing and signing his commission and that the President's failure to do so was tantamount to removal of petitioner's name from the promotion list pursuant to 10

U.S.C. 5905(a) (Pet. App. A-5 to A-14). The court of appeals affirmed (Pet. App. A-2 to A-4).

Petitioner contends here that while 10 U.S.C. 5902(d) authorizes the Secretary of the Navy to delay promotions pending the resolution of proceedings against a candidate, only the President is authorized by statute (10 U.S.C. 5905 (a)) to remove a candidate from a promotion list. Even if that contention were true, it does not avail petitioner's claim to a promotion, since, as the courts below correctly concluded, the President has no obligation to complete petitioner's promotion, and accordingly petitioner has no legal claim to that promotion. *D'Arco v. United States*, *supra*. Cf. *Marbury v. Madison*, 1 Cranch 137.

In any event, the Secretary has implied authority to act for the President in removing candidates from promotion lists. Delegation of Presidential functions to an agency head need not "require express authorization in any case in which such an official would be presumed in law to have acted by authority or direction of the President." 3 U.S.C. 302. The Secretary's removal of petitioner's name from the promotion list was such a case. See *Brownfield v. United States*, 148 Ct. Cl. 411, 416-417; *D'Arco v. United States*, *supra*.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

JUNE 1977.